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VII. Spoliation of Discoverable Electronic Evidence

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VII. SPOILIATION OF DISCOVERABLE ELECTRONIC EVIDENCE *

A. Introduction

Spoilation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or future litigation.¹ Such document destruction² is and ought to be proscribed.

1. Contemporary Significance of Spoilation

Gregory P. Joseph has suggested “[t]he lasting legal legacy of the current era of electronic discovery likely will lie in the area of spoilation and sanctions.”³ This section will delineate the policy reasons against the destruction of evidence and will conclude with a brief discussion of the qualitative differences between the illegitimate destruction of tangible versus electronic evidence.

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1. See, e.g., *MasterCard Int’l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM) (MHD), 2004 U.S. Dist. LEXIS 11,376, at *9 (S.D.N.Y. June 16, 2004); *Thompson v. United States Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001).

2. The term “document destruction” in this article means the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or future litigation.

3. Gregory P. Joseph, *Electronic Spoilation*, COMPUTER & INTERNET LAW, July, 2003, at 16. It is also worth noting that “electronic discovery has moved from an unusual activity encountered in large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in federal courts.” COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMM. 2 (2004) [hereinafter ADVISORY], <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

a. Policy reasons against the destruction of evidence

The absence of evidentiary proof “may stymie the search for the truth.”⁴ Because discovery is an integral part of the adversary system, the process itself would become ineffectual if parties began to “circumvent discovery requests by selectively destroying potentially damaging information.”⁵ As such, “when a charge is made that relevant information has been destroyed, and especially when a charge is made of intentional destruction, it is a charge that strikes at the core of our civil litigation system.”⁶ Spoliation can lead to “manifest unfairness and injustice,” by increasing both “the risk of an erroneous decision on the merits of the underlying cause of action” and “the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence that may be less persuasive, less accessible or both.”⁷

b. Qualitative differences between the destruction of electronic versus tangible evidence

“Lawyers know how to review, shepherd, and maintain paper. Electronic data are another matter.”⁸ In some ways, the increased use of electronic evidence during the course of discovery has been beneficial to litigators. Unlike tangible documents, electronic data can exist for a virtually limitless period of time.⁹ Retaining electronic data is also less burdensome, given that the data occupy very little space.¹⁰

Electronic discovery can also be a litigator’s worst nightmare. Although electronic data consume very little space, the burden of producing such data is often overwhelming.¹¹ For example, a party

4. *Zubulake*, 220 F.R.D. at 214.

5. *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 606 n.5 (7th Cir. 2001).

6. *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (West) 828, 829 (N.D. Ill. 2000).

7. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001).

8. *Joseph*, *supra* note 3, at 16.

9. *See, e.g.*, Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 268 (2001).

10. *See, e.g., id.*

11. The most prominent distinction between electronic and tangible discovery is “the exponentially greater volume that characterizes electronic

who is asked for “electronic records” may have to locate and produce “voice mail, e-mail, deleted e-mail, data files, program files, back-up files, archival tapes, temporary files, system history files, web site information in textual, graphical or audio format, web site files, cache files, ‘cookies’ and other electronically stored information.”¹² Just as there are many types of electronic records, there are also a variety of locations in which those records may be housed. Finding the relevant data may require the producing party to search through “desk-top computers, laptops, PDA’s, employee home computers, back-up and archival data, and systems files” and may even call for the use of special search methods.¹³

Furthermore, “[a]s documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence.”¹⁴ A computer’s “delete” function does not *actually* destroy data; it merely makes the data available for overwriting if that particular space on the computer’s hard disk is needed in the future.¹⁵ Conversely, “information stored in electronic form is easily

data,” because it makes electronic discovery “more burdensome, costly, and time-consuming.” ADVISORY, *supra* note 3, at 2. For a more specific illustration of the *qualitative* differences between electronic and tangible evidence, consider the following:

A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

MANUAL FOR COMPLEX LITIGATION (4th) § 11.446 (quoted in ADVISORY, *supra* note 3, at 12) [hereinafter MANUAL].

12. *Thompson v. United States Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003) (citing omitted).

13. *Id.* at 97.

14. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003); see Marcus, *supra* note 9, at 267 (noting that electronic discovery increases the risk of “phony evidence”).

15. *Thompson*, 219 F.R.D. at 96; ADVISORY, *supra* note 3, at 2; Marcus, *supra* note 9, at 64; Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 FED. CTS. L. REV. 2, 5 (2000); Michael Marron, Comment, *Discoverability of “Deleted” E-Mail: Time For a Closer Examination*, 25 SEATTLE U. L. REV. 895, 907–08 (2002) (reminding readers that “[c]ontrary to what most people believe, it is extremely difficult for the average, technologically unsophisticated, e-mail user to render an unwanted e-

changed, overwritten, or obliterated by everyday use of the computer.”¹⁶ Although the deleted data may or may not be retrievable, courts have nonetheless held that Fed. R. Civ. P. 34 entitles parties to request deleted data from their adversaries.¹⁷

2. Current State of the Law

Courts have found it increasingly difficult to reconcile the unique nuances of electronic discovery with the existing federal rules.¹⁸ Case law on electronic spoliation is sparse and often inconsistent,¹⁹ so many courts have turned to other jurisdictions for answers to resolve disputes on this issue. No unified test or set of considerations has been developed to apply to circumstances of spoliation.²⁰ While most courts agree on the major spoliation elements (e.g., duty to preserve and breach of that duty), some jurisdictions have developed their own tests for the more minute spoliation considerations (e.g., the factors to consider when deciding whether to impose a default judgment). As such, this section will delineate the overarching test for spoliation while also pointing out any jurisdictional deviations from the majority rule.

B. Breach of the Duty to Preserve

1. Introduction

A party may only be held culpable for spoliating evidence that it was under a duty to preserve.²¹ The duty to preserve, however, is an

mail message unrecoverable. . . . In the context of e-mail messages, therefore, delete does not mean delete.”).

16. Withers, *supra* note 15, at 2; see ADVISORY, *supra* note 3, at 3 (stating that the “ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy electronically stored information”).

17. See, e.g., *Thompson*, 219 F.R.D. at 96; *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D.N.Y. 2000); *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999).

18. See ADVISORY, *supra* note 3, at 3.

19. *Id.*

20. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001).

21. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (noting that such a requirement “goes without saying”); see also *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 60 (2003) (referring to the duty to

affirmative obligation,²² requiring a party to preserve any and all properly discoverable evidence to the extent permissible under Fed R. Civ. P. 26.²³

This section will delineate two ways in which the duty to preserve can arise. It will conclude with a brief discussion of document retention policies and their relationship with the duty to preserve.

2. When the Duty to Preserve Arises

a. Litigation

The duty to preserve evidence arises when a “party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”²⁴ In other words, a party must begin its preservation efforts once “it reasonably anticipates” involvement in a suit.²⁵ Notice of impending

preserve evidence as a “threshold issue” in deciding spoliation matters); *Rambus, Inc. v. Infineon Tech. AG*, 220 F.R.D. 264, 281 (E.D. Va. 2004) (stating that a movant must show that the adverse party had a duty to preserve evidence in order to establish his spoliation claim); *Liafail, Inc. v. Learning 2000, Inc.*, Nos. 01-599 GMS & 01-678 GMS, 2002 U.S. Dist. LEXIS 24803, at *9 (D. Del. Dec. 23, 2002) (noting that spoliation requires a showing that “the party having control over the evidence had an obligation to timely produce it.”); *Trigon*, 204 F.R.D. at 286 (explaining that there would be no wrongdoing in destroying relevant documents if the duty to preserve did not exist).

22. *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (West) 828, 869 (N.D. Ill. 2000) (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997)).

23. See, e.g., *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *12 (N.D. Ill. Oct. 24, 2003); *Danis*, 53 Fed. R. Serv. 3d (West) at 870; *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 434 (W.D. Pa. 2004); *Thompson v. United States Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003). It is worth noting that a party is not required to preserve every minutia of evidence. See *Zubulake*, 220 F.R.D. at 217 (noting that a party is not under an obligation to preserve “every shred of paper, every e-mail or electronic document, and every backup tape”). For a detailed discussion of the scope of electronic discovery, see *supra* Part III.

24. *Zubulake*, 220 F.R.D. at 216 (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 426 (2d Cir. 2001)); see also *Rambus*, 220 F.R.D. at 281; *Trigon*, 204 F.R.D. at 287.

25. *Zubulake*, 220 F.R.D. at 217.

litigation typically stems from receipt of pre-litigation correspondence, or service of the complaint, the answer, or discovery requests.²⁶

Although a party must be vigilant with respect to preservation in anticipation of potential for litigation, it need not be unrealistic. For example, an entire company does not need to begin its preservation efforts if only one or two employees contemplate the possibility that a fellow employee might sue.²⁷ If contemplation of the possibility of an imminent suit becomes widespread, however, the company's duty to preserve will obviously arise.²⁸

b. Motion to preserve

A party that fears its adversary might destroy documents may file a motion for a preservation order.²⁹ A court³⁰ may issue this injunctive remedy upon "an adequate showing that equitable relief is warranted."³¹ Although such preservation orders have become "increasingly routine in cases involving electronic evidence,"³² the moving party bears the burden of convincing the court that the destruction of discoverable evidence is more than a mere

26. Lisa M. Arent et al., *EDiscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 138 (2002).

27. *Zubulake*, 220 F.R.D. at 217.

28. *Id.* (duty to preserve arose where plaintiff's colleague sent an e-mail detailing the allegations to plaintiff's current and former supervisor and another colleague).

29. *Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 U.S. Dist. LEXIS 6427, at *2 (N.D. Tex. April 16, 2003).

30. All Article I courts, including federal claims courts, as well as Article III courts, possess the inherent authority to issue motions to preserve. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135-37 (2004). Such authority is founded in a court's power to prevent abuses of process and its ability to preserve relevant evidence. *Id.* at 137.

31. *Madden*, 2003 U.S. Dist. LEXIS 6427, at *2.

32. *Laguna*, 60 Fed. Cl. at 136; see also *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 431 (W.D. Pa. 2004) (stating that "orders directing parties to preserve materials or documents are common in circumstances in which evidence is subject to being destroyed or lost in routine and sometimes not-so-routine deletion or destruction of information.").

possibility.³³ Because *all* litigants are under a duty to preserve evidence without such an order, a court should only issue a motion to preserve under special circumstances, such as when there is a clear threat of irreparable harm.³⁴

One district court has articulated a three-prong test for determining the appropriateness of a preservation order.³⁵ This test requires the court to consider the following factors:

- 1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence;³⁶ 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation;³⁷ and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.³⁸

Furthermore, the permissible scope of preservation orders has become increasingly narrow.³⁹ Broad or "blanket" preservation orders, which "call[] on the responding party to immediately halt all operations that can result in the destruction or alteration of computer

33. *Madden*, 2003 U.S. Dist. LEXIS 6427, at *2-*4 (preservation order was inappropriate where plaintiff could not show that defendants would "flaunt" their preservation duties).

34. *Id.* at *2-*3. A court should not be inclined to enter a preservation order "[w]ithout some proof that evidence may be lost or destroyed without" one. *Id.* at *4.

35. *Capricorn*, 220 F.R.D. at 433-34.

36. *Id.* at 433. The "absence of any significant past, present or future threat to the continuing integrity or existence of the evidence" would render a preservation order "superfluous." *Id.* at 434.

37. *Id.* at 433. "The loss or destruction of certain evidence can result in significant prejudice to the party seeking to use it in proving the party's claims." *Id.* at 435.

38. *Id.* at 433-34. "Considerations such as storage space, maintenance and storage fees, and physical deterioration of the evidence are just a few of the considerations to be evaluated when considering this final factor." *Id.* at 435-36.

39. See Nat'l Ctr. for State Courts, *Electronic Discovery: Questions and Answers*, CIV. ACTION, Summer 2004, at 4.

data,” are unreasonable because they may “put a computer-dependent company out of business.”⁴⁰ Thus, if a court finds that a preservation order is warranted, the order should be “narrowly tailored” and describe, “with particularity, what the scope of discovery will be. . . .”⁴¹

3. A Note on Document Retention Policies

In practical terms, the duty to preserve evidence simply obligates parties to behave reasonably.⁴² Because of the unique nature of electronic data, parties may take considerable latitude in choosing reasonable preservation methods.⁴³ Such latitude can become a double-edged sword, however, since parties who fail to exercise any one of a myriad of options cannot be found to have behaved reasonably in the eyes of the law.⁴⁴

40. *Id.* (stating that “[t]wenty years ago, a document preservation order might inconvenience the back office of a company, but the assembly line and sales continued. In the information economy, the computer system functions not only as the back office, but also as the assembly line *and* sales operation.”) (emphasis added); see ADVISORY, *supra* note 3, at 7–8 (noting that suspending document destruction “could paralyze a party’s operations”).

41. Nat’l Ctr. For State Courts, *supra* note 39, at 4. In order to ensure that the preservation order is narrowly tailored, the court should take into account the requesting party’s scope of discovery and “the nature of [the responding party’s] data collection and its ability to preserve the relevant data.” *Id.*

42. *Id.* at 3 (asserting that “[t]he central element of a company’s duty to preserve is to act reasonably and in good faith”).

43. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches . . . creates a complete set of relevant documents.

Id. It is also worth noting that “virtually all companies have document retention policies.” *Rambus, Inc. v. Infineon Tech. AG*, 220 F.R.D. 264, 285 (E.D. Va. 2004).

44. See, e.g., *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *1 (N.D. Ill. Oct. 24, 2003). *Wiginton* concerned a sexual harassment suit brought by an employee against her former employer. *Id.* at *2. Defendant failed to preserve the computer hard-drives, e-mail accounts, and Internet records of those who had specifically been charged with harassment, claiming that the search for relevant documents would have been

Parties can also breach the duty to preserve when their document retention policies are themselves unreasonable in light of preservation requirements.⁴⁵ “[A] records retention policy which is inconsistent with a party’s obligations to a potential or actual adversary in litigation [does not] excuse the party’s failure to respond to discovery.”⁴⁶ Put simply, “[a] party cannot destroy documents based solely on its own version of the proper scope of the complaint.”⁴⁷ Furthermore, parties run the risk of heightening judicial suspicion when they *conveniently* tailor their document retention policies to reflect their litigation strategies.⁴⁸

Although legally-compliant document retention policies appear simple in theory, creating them can be extremely problematic. Companies typically implement such policies with their own business needs in mind rather than in ways that would facilitate discovery.⁴⁹ This tension between business and litigation obligations has been referred to as “the greatest” of the “discovery-related issues that trouble corporations” and is described in detail below:⁵⁰

Up to now, most cases involving substantial electronic discovery have involved major corporations. In creating a digital recordkeeping system, a business’s first set of

too costly. *Id.* at *15–*17. The court was unconvinced by this argument since Defendant could have exercised other, less cost-prohibitive options, such as implementing e-mail filters or conducting keyword searches. *Id.* at *17–*18.

45. *See, e.g., Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 61 (2003); *Rambus*, 220 F.R.D. at 283–87.

46. *Renda Marine*, 58 Fed. Cl. at 61. In *Renda Marine*, Defendant’s retention policy, implemented over a year after it was put on notice of potential litigation, instructed employees to delete e-mails after they had been read. *Id.*; *see also Rambus*, 220 F.R.D. at 286 (reminding that even “valid purging program[s]” must be put on hold when litigation is on the horizon).

47. *Wiginton*, 2003 U.S. Dist. LEXIS 19128, at *15 (quoting *Diersen v. Walker*, No. 00 C 2437, 2003 U.S. Dist. LEXIS 9538, at *5 (N.D. Ill. June 6, 2003)).

48. *See Rambus*, 220 F.R.D. at 287 (noting the court’s expression of its suspicion where the spoliating party “was developing both a . . . litigation strategy and its document retention program *at the same time*”).

49. *See, e.g., McPeck v. Ashcroft*, 202 F.R.D. 31, 32–33 (D.D.C. 2001) (noting that, unlike paper documents, back-up tapes are not catalogued by subject matter, which lends to the possibility of arduous discovery); Nat’l Ctr. For State Courts, *supra* note 39, at 3.

50. Nat’l Ctr. For State Courts, *supra* note 39, at 3.

concerns focuses on having the system perform all the business-related operations functions at the lowest cost, and out of the myriad of records created, identifying those with sufficient long-term importance to retain. General legal liability concerns are layered on top of this prime focus. Litigation-related issues such as discovery are superimposed on these basic operational dictates. Preserving and finding the requested files among the millions that are created annually becomes an enormous and difficult undertaking. The impact on operations and expense is exacerbated by the fact that few large businesses have the luxury of dealing with only one discovery request at a time. Depending on the company, there may be anywhere from dozens to thousands of tort, commercial, class action, regulatory, and employment cases proceeding simultaneously.⁵¹

Although companies cannot completely eliminate the burdens of preservation,⁵² they can take steps to minimize such burdens. For example, it is in a company's best interest to create a retention policy that specifically addresses how its Internet technology [IT] department "is to implement and ensure compliance across all IT systems and equipment."⁵³ The company can take further action by creating a policy that anticipates potentially disruptive effects on employee practices.⁵⁴

4. Recovering Deleted Data

Fed R. Civ. P. 34 treats deleted data as a "document" for purposes of discoverability.⁵⁵ As a result, a party should make all

51. *Id.*

52. *See, e.g., id.* (discussing breadth of safe harbor created by proper document retention policy).

53. PRACTISING LAW INST., ORDER NO. 2855, DISCOVERY AND USE OF ELECTRONIC EVIDENCE 449 (2004).

54. *Id.* at 448. "For example, many desktop computers automatically store e-mail to the computer's hard drive. Even if employees delete e-mail properly, copies of e-mails may still exist on the hard drive in residual—and discoverable—form." *Id.*

55. *E.g., Simon Prop. Group. v. mySimon Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000). For a detailed discussion of what constitutes a document for purposes of electronic discovery, see *supra* Part II.

attempts to recover deleted data. It can do so in one of several ways.

First, a party can hire a computer forensics expert who will attempt to restore the deleted data. Because deleted data may remain on a computer's hard disk or on removable storage media for months or years, "restoring the deleted data is a relatively simple task" for a trained expert.⁵⁶ It should be noted, however, that hiring such an expert can be very costly and results are not guaranteed.⁵⁷

If hiring an expert is not a viable option, a party should inspect its backup tapes. Many individuals and most companies "periodically backup their data onto tapes or disks for disaster recovery purposes."⁵⁸ Most data—even those that have been deleted, edited, or written over—can be found in those backup tapes.⁵⁹

The difficulty, however, arises once it comes time to locate the desired data. Because the data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system, the organization of the data mirrors the computer's structure rather than human records management structure.⁶⁰ Because of the burdens that flow from the backup tapes' form of organization, opposing counsel "should be prepared to demonstrate that [backup tape] discovery is necessary and germane to the case."⁶¹

Because data restoration and backup tape inspection can delay and increase the cost of discovery, a party may condition the restoration or retrieval on the requesting party's paying some or all of the costs.⁶²

56. Withers, *supra* note 15, at 5; see Marron, *supra* note 15, at 897 (noting that it is "increasingly common for a party to request that the opposing party recover and produce . . . deleted e-mail messages through use of special 'forensic' computer techniques.").

57. ADVISORY, *supra* note 3, app. at 11 (noting that data may be "deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques."); Withers, *supra* note 15, at 5.

58. Withers, *supra* note 15, at 5.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* See *supra* Part IV for a detailed discussion of cost-shifting during

5. Summary of Preservation Obligations

The court in *Zubulake v. UBS Warburg LLC* summarized the scope of a party's electronic preservation obligation as follows:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.

However, it does not make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.⁶³

C. Sanctions

1. Introduction

There is a deeply-rooted notion that spoliators should not be able to benefit from their wrongdoing.⁶⁴ Courts have broad discretion in deciding the appropriate sanction for such wrongdoing and are able to tailor sanctions to the unique factual circumstances of a given case.⁶⁵

the course of electronic discovery.

63. 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

64. *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 284 (E.D. Va. 2001). The notion is captured in the maxim *omnia presumuntur contra spoliatores*, which means, "all things are presumed against a despoiler or wrongdoer." *Id.* (quoting BLACK'S LAW DICTIONARY 1086 (6th ed. 1997)).

65. *Kucala Enters. v. Auto Wax Co.*, 53 Fed. R. Serv. 3d (West) 487, 492 (N.D. Ill. 2003); see also *Liafail, Inc. v. Learning 2000, Inc.*, Nos. 01-599 GMS & 01-678 GMS, 2002 U.S. Dist. LEXIS 24803, at *8 (D. Del. Dec. 23,

This section will begin by discussing the sources of the court's sanction power. It will then discuss the timeliness of a motion for sanctions, namely what actions a court should take when a party has requested sanctions prematurely. Next, it will discuss the two factors a court must use to determine whether sanctions are warranted: culpability and the connection between the destroyed evidence and the case at hand. This section will go on to delineate the various tests that federal circuits use in determining what type of sanction is appropriate in a given case. It will further describe the most frequently-used sanctions for spoliation, and discuss the various tests that courts use to determine whether a default judgment is an appropriate remedy.

2. Sources of a Court's Sanction Power

A court has statutory authority to sanction a party for discovery violations.⁶⁶ Fed R. Civ. P. 37 provides that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just"⁶⁷ It is worth highlighting that a court may only impose sanctions pursuant to Rule 37 when "a court order or discovery ruling of some sort has been violated."⁶⁸

A court also has inherent authority to sanction a party for discovery violations.⁶⁹ This authority stems from a court's ability to

2002) (noting that the court has broad discretion in fashioning spoliation sanctions); *Trigon*, 204 F.R.D. at 288 (stating that "judicial decisions which are discretionary cannot be tied down to a fixed rule or formula. If such were the case, courts would lose their flexibility in the sanctions process, and discretion would lose its meaning.") (quoting *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 102 (D. Colo. 1996))).

66. *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *11 n.5 (N.D. Ill. Oct. 24, 2003); *Zubulake*, 220 F.R.D. at 216; *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (West) 828, 868 (N.D. Ill. 2000).

67. Fed. R. Civ. P. 37(b)(2).

68. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *11 n.5.

69. See *AdvantaCare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 U.S. Dist. LEXIS 16,835, at *10 (N.D. Cal. Aug. 17, 2004); *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *11; *Zubulake*, 220 F.R.D. at 216; *Pennar Software Corp. v. Fortune 500 Sys., Ltd.*, No. 01-01734 EDL, 2001 U.S. Dist. LEXIS 18,432, at *15 (N.D. Cal. Oct. 25, 2001); *Danis*, 53 Fed. R. Serv. 3d (West) at 868; *Trigon*, 204 F.R.D. at 285.

“manage [its] own dockets and ensure the expeditious resolution of cases.”⁷⁰

3. Timeliness of a Motion for Sanctions

In most cases involving spoliation, it is impossible to determine the extent and nature of the destroyed evidence.⁷¹ In a small fraction of cases, however, a party can glean what the extent of spoliation is by looking through the backup tapes that house the previously-deleted documents.⁷² In such cases, the requesting party should examine the backup tapes before asking the court to impose sanctions on the spoliating party.⁷³ If confronted by a premature request for sanctions (i.e., a request made before a party has looked through available backup tapes), a court will likely deny the party’s motion for sanctions without prejudice.⁷⁴

4. Factors in Determining Whether Sanctions Are Appropriate

a. Culpability

i. Introduction

The first factor a court will look at when deciding whether to impose sanctions is a party’s culpability with regard to the spoliation.⁷⁵ Although spoliation is a bit of a misnomer (the term

70. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *11.

71. *See id.* at *25.

72. *See id.*

73. *See id.*

74. *See id.* In *Wiginton*, the moving party had access to three month’s worth of backup tapes. *Id.* at *26. The court denied the party’s motion for sanctions without prejudice, reasoning that the party could renew its motion if its expert could discover relevant documents on the backup tapes. *Id.* Similarly, a court should give a party the opportunity to correct or clarify the discovery record by producing the requested documents. *Liafail, Inc. v. Learning 2000, Inc.*, Nos. 01-599 GMS & 01-678 GMS, 2002 U.S. Dist. LEXIS 24,803, at *8 (D. Del. Dec. 23, 2002).

75. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003); *Kucala Enters. v. Auto Wax Co.*, 56 Fed. R. Serv. 3d (West) 487, 492 (N.D. Ill. 2003); *Liafail*, 2002 U.S. Dist. LEXIS 24803, at *9; *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001) (noting that there must be “some quantum of blameworthiness” for the court to impose sanctions).

itself implies intent when, in fact, most spoliation is the result of negligence or sheer ignorance),⁷⁶ it is suggested that a negligent loss of data “is compounded by counsel’s failure to communicate the facts to opposing counsel and the court, or because counsel misrepresents the facts to the court, [or] attempts to cover up for its failure”⁷⁷

Culpability is generally divided into two categories: negligence and bad faith.⁷⁸ Although both categories warrant the imposition of sanctions,⁷⁹ the severity of the sanction imposed will correlate with a party’s level of culpability.⁸⁰

ii. Variations in required level of culpability

(a) negligence

Courts can impose sanctions for “mere negligence in preserving” discoverable evidence.⁸¹ It is common knowledge within the legal community that negligence implies unreasonable behavior.⁸² Because negligent action is largely fact-specific,⁸³ there

76. See Nat’l Ctr. for State Courts, *supra* note 39, at 6.

77. *Id.*

78. See, e.g., *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *20 (stating that a culpable state of mind may be evidenced “by negligent actions or a flagrant disregard of the duty to preserve potentially relevant evidence”).

79. See, e.g., PRACTISING LAW INST., *supra* note 53, at 447–48 (explaining that the failure to preserve electronic documents, “whether intentional or inadvertent, may be deemed spoliation”).

80. See, e.g., *AdvantaCare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 U.S. Dist. LEXIS 16,835, at *12 (N.D. Cal. Aug. 17, 2004) (noting that courts should use their inherent sanctions powers with discretion by “fashioning a sanction appropriate for the specific conduct abusive of the judicial process”); *Kucala*, 56 Fed. R. Serv. 3d (West) at 492 (explaining that a court “should ensure that the sanction be proportionate to the offending conduct”).

81. Joseph, *supra* note 3, at 16.

82. Negligence is the “legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary or great.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 n.46 (S.D.N.Y. 2003) (quoting BLACK’S LAW DICTIONARY (6th ed. 1991)).

83. See *MasterCard Int’l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM) (MHD), 2004 U.S. Dist. LEXIS 11,376, at *11 (S.D.N.Y. June 16, 2004).

is no mechanical formula that a court can use to determine whether a party has behaved negligently in the course of document production. Fortunately, case law on spoliation can provide a court with a few telltale signs of negligence.

The most obvious example of negligence during the course of production is when a party that is under a duty to produce evidence attempts to find such evidence but fails in doing so.⁸⁴ Despite good faith efforts in trying to procure the missing evidence, such conduct still rises to the level of negligence since the party was on notice that the evidence was potentially relevant to litigation.⁸⁵

Courts have also found negligence where a party fails "to alter normal business practices in response to pending or threatened litigation."⁸⁶ For example, a party's behavior rises to the level of negligence when the party is subjectively unaware that specific relevant documents are scheduled for destruction according to the party's document retention policy and the documents are destroyed.⁸⁷

Although case law is sparse, some courts have held corporate parties may behave negligently by inappropriately delegating preservation duties across the organization. For example, parties have been found negligent when only some employees were warned of pending litigation and told what to do with their computer files.⁸⁸ Similarly, corporations may behave negligently when they delegate responsibility for preserving electronic data to low-level employees who lack both litigation experience and an understanding of the legal scope of the duty to preserve.⁸⁹ Lastly, corporate parties behave negligently when they fail to follow-up on their preservation orders to see if they are actually being adhered to.⁹⁰

84. See *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *25 (N.D. Ill. Oct. 24, 2003).

85. See *AdvantaCare*, 2004 U.S. Dist. LEXIS 16,835, at *13.

86. Todd L. Krause & Brian D. Coggio, *Electronic Discovery: Where We Are, and Where We're Headed*, 3 J. PROPRIETARY RTS. 16, 17 (2004). It is worth noting that a company can also be found negligent when it fails to implement any type of document retention policy whatsoever. *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (West) 828, 878 (N.D. Ill. 2000).

87. See *Wiginton*, 2003 U.S. Dist. LEXIS 19128, at *23.

88. Nat'l Ctr. for State Courts, *supra* note 39, at 3.

89. *Id.*

90. See *Danis*, 53 Fed. R. Serv. 3d (West) at 878.

(b) bad faith

A party acts in bad faith when it destroys documents “for the purpose of hiding adverse information”⁹¹ or “obstructing the litigation.”⁹² Because there is no certain way of ascertaining the nature of the destroyed information (after all, the evidence is no longer available), a “court may look at the circumstances surrounding the destruction to determine if the non-producing party acted in bad faith.”⁹³

The most unequivocal form of bad faith is “direct destruction.”⁹⁴ Direct destruction occurs when a party intentionally destroys relevant evidence for the purpose of hiding it.⁹⁵

A more equivocal form of bad faith is what courts have called “willful blindness.”⁹⁶ A party engages in willful blindness when it knows that discoverable evidence is available but nonetheless allows for its destruction.⁹⁷ At that point, a court will find that the reason for the destruction was that “the party knew that relevant evidence was contained in the documents and wanted to hide the adverse information, rather than because the documents were scheduled to be destroyed.”⁹⁸

91. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *22 n.6 (quoting *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998)).

92. *MasterCard Int’l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM) (MHD), 2004 U.S. Dist. LEXIS 11,376, at *11 (S.D.N.Y. June 16, 2004).

93. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *22 n.6.

94. *See Danis*, 53 Fed. R. Serv. 3d (West) at 878.

95. *See, e.g., Pennar Software Corp. v. Fortune 500 Sys., Ltd.*, No. 01-01734 EDL, 2001 U.S. Dist. LEXIS 18,432, at *16–*17 (N.D. Cal. Oct. 25, 2001) (finding party acted in bad faith by deleting relevant webpages from a webserver and altering the server’s log files); *Kucala Enters. v. Auto Wax Co.*, 56 Fed. R. Serv. 3d (West) 487, 494 (N.D. Ill. 2003) (finding party acted in bad faith by using “Evidence Eliminator” software on his computer).

96. *Danis*, 53 Fed. R. Serv. 3d (West) at 878; *Wiginton*, 2003 U.S. Dist. LEXIS 19128, at *24.

97. *See Danis*, 53 Fed. R. Serv. 3d (West) at 878.

98. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *23. The company was found willfully blind where it did not inform those in charge of document retention that litigation was on the horizon. *Id.* at *23–*24.

b. Connection between destroyed evidence and litigation

If the court concludes that a party's spoliation was negligent, but not willful, it will then consider the connection between the destroyed evidence and litigation.⁹⁹ Some courts refer to this factor as "relevancy,"¹⁰⁰ while others label it "prejudice."¹⁰¹ Semantic distinctions aside, this requirement simply mandates that the "[d]estruction of evidence . . . go to the heart of the case."¹⁰²

The destroyed documents must be relevant, such that a reasonable trier of fact could infer that they would have supported the moving party's claims.¹⁰³ Although the loss of relevant documents prejudices the requesting party by definition, the level of prejudice can vary tremendously.¹⁰⁴ For example, the destroyed evidence may have been the *only* proof of an issue or defense in the case.¹⁰⁵ Likewise, the unavailable evidence may have not been the only proof available, but it may have been the *best* proof.¹⁰⁶ So long as the court is satisfied that the evidence was relevant and some prejudice will ensue, the moving party will have met its burden.¹⁰⁷ The court will then take the degree of prejudice into account when it

99. In cases of willful spoliation, "the spoliator's mental culpability [is] itself evidence of the relevance of the documents destroyed"; in cases of negligent spoliation, "it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003) (citations omitted).

100. *See, e.g., Zubulake*, 220 F.R.D. at 221; *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM) (MHD), 2004 U.S. Dist. LEXIS 11,376, at *12 (S.D.N.Y. June 16, 2004); *Thompson v. United States Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003).

101. *See, e.g., Kucala Enters. v. Auto Wax Co.*, 56 Fed. R. Serv. 3d (West) 487, 492-93 (N.D. Ill. 2003); *Danis*, 53 Fed. R. Serv. 3d (West) at 873.

102. *AdvantaCare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 U.S. Dist. LEXIS 16,835, at *19 (N.D. Cal. Aug. 17, 2004).

103. *Liafail, Inc. v. Learning 2000, Inc.*, Nos. 01-599 GMS & 01-678 GMS, 2002 U.S. Dist. LEXIS 24,803, at *9 (D. Del. Dec. 23, 2002); *Zubulake*, 221 F.R.D. at 220.

104. *Danis*, 56 Fed. R. Serv. 3d (West) at 874 (reminding that "[t]he prejudice suffered from the destruction of documents can take many forms.").

105. *See, e.g., id.* (noting that this is the most severe form of prejudice).

106. *See, e.g., id.*

107. *See, e.g., id.* at 873-74.

decides what *type* of sanction to impose.¹⁰⁸

5. Determining the Appropriate Sanction(s)

Once a court has determined that sanctions are warranted, it will go on to consider what type of sanction to impose. In making this determination, a court will consider a variety of factors. This section will delineate the test that the majority of courts use and will conclude with a brief description of the test that the Fourth Circuit has enunciated.

a. General test

The available case law on this topic, outside of the Fourth Circuit, suggests that a court should consider three ultimate goals when fashioning a sanction:

- (1) deterring parties from spoliation;
- (2) placing the risk of erroneous judgment on the party who initially created the risk; and
- (3) restoring the prejudiced party to the position it would have been if had the spoliation not occurred.¹⁰⁹

b. Fourth circuit test

The Fourth Circuit has devised “a five-factor test to “guide trial courts in determining appropriate sanctions to impose. . . .”¹¹⁰ The factors are as follows:

- (1) the surprise to the party against whom the evidence would be offered;
- (2) the ability of that party to cure the surprise;
- (3) the extent to which allowing the evidence would disrupt the trial;
- (4) the importance of the discovery; and
- (5) the explanation of the non-disclosing party for its failure

108. See discussion *infra* Part VII.C.5.

109. See, e.g., *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM) (MHD), 2004 U.S. Dist. LEXIS 11376, at *14 (S.D.N.Y. June 16, 2004); *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 287 (E.D. Va. 2001).

110. *Thompson v. United States Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 103 (D. Md. 2003).

to provide the discovery.¹¹¹

6. Typical Sanctions

In general, a court may sanction a spoliating party in one of four ways: (1) the court may enter a default judgment against the spoliating party;¹¹² (2) the “[c]ourt may instruct the jury that it may draw an inference adverse to the” spoliating party;¹¹³ (3) the “[c]ourt may issue civil contempt sanctions, which coerce a party into compliance with the court’s order and/or compensate the plaintiff for the violation”;¹¹⁴ or (4) the “[c]ourt may assess attorney’s fees”.¹¹⁵

This section will describe each of the remedies in turn, focusing specifically on the practicalities and considerations that come into play with regard to each sanction.

a. Default judgment

Because “[j]ustice is best served by hearing cases on their merits,”¹¹⁶ courts consider the entering of a default judgment to be a severe sanction.¹¹⁷ As such, they carefully consider a number of

111. *Id.* (citing *Southern States Rack and Fixture, Inc. v. Sherwin Williams*, 318 F.3d 592 (4th Cir. 2003)). The court elaborated that the factors “provide[] a useful measure to insure against unwarranted imposition of sanctions that may be so severe as to end, or severely damage, a party’s ability to present its case at trial.” *Id.* at 103 n.8.

112. *AdvantaCare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 U.S. Dist. LEXIS 16835, at *11 (N.D. Cal. Aug. 17, 2004) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991)).

113. *Id.* at *11–*12 (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Akonion v. U.S.*, 938 F.2d 158, 161 (9th Cir. 1991)).

114. *AdvantaCare*, 2004 U.S. Dist. LEXIS 16,835, at *12 (citing *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992)).

115. *Id.* (citing *Chambers*, 501 U.S. at 45; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

116. *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19,128, at *21 (N.D. Ill. Oct. 24, 2003).

117. *See, e.g., Thompson v. United States Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 102 (D. Md. 2003) (declaring that case-determinative remedies may be “draconian”); *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *20 (reminding that default judgment is a “harsh” sanction only warranted in extreme situations); *Kucala Enters. v. Auto Wax Co.*, 56 Fed. R. Serv. 3d (West) 487, 492 (N.D. Ill. 2003) (stressing that default judgment should be applied only in “extreme scenarios”); *Pennar Software Corp. v. Fortune 500 Sys., Ltd.*, No. 01-01734 EDL, 2001 U.S. Dist. LEXIS 18,432, at *16 (N.D. Cal. Oct. 25,

factors when deciding the appropriateness of a default judgment. This section will begin by delineating the most typical factors a court considers when deciding whether to impose a default judgment. It will conclude by delineating the Ninth Circuit's requirements for default judgment.

i. General requirements for default judgment

Although there is no general systematic test for determining the appropriateness of a default judgment, courts have enunciated a handful of factors to be considered when determining whether this sanction is appropriate.¹¹⁸

As a threshold issue, a court will not enter a default judgment unless the spoliating party acted with willfulness, bad faith, or fault,¹¹⁹ and there is clear and convincing evidence of such misconduct.¹²⁰

Although courts are not required to first impose less drastic sanctions, they will typically apply default judgments only when "lesser sanctions have proven futile."¹²¹

Courts may also consider prejudice to the victim when determining the efficacy of a default judgment. For example, courts have stated that a default judgment is appropriate when a party destroys the only existing piece of evidence.¹²²

ii. Ninth circuit's requirements for default judgment

(a) *extraordinary circumstances*

A court will first consider whether extraordinary circumstances

2001) (noting that default judgment is a "punitive" sanction); *Danis v. USN Communications, Inc.*, 53 Fed. R. Serv. 3d (West) 828, 871 (N.D. Ill. 2000) (referring to default judgment as "the most severe sanction").

118. The cases cited *infra* note 117 do not suggest that a court must consider all of these factors before imposing a default judgment; most courts have only verbalized a consideration of one or two factors at a time.

119. See, e.g., *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *20; *Kucala*, 56 Fed. R. Serv. 3d (West) at 492; see discussion *supra* Part VII.C.4.a.ii.(a)(b) for a more detailed description of culpable states of mind.

120. *Pennar Software Corp.*, 2001 U.S. Dist. LEXIS 18432, at *16.

121. *Id.* at *13 (citing *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir. 1981)).

122. *Wiginton*, 2003 U.S. Dist. LEXIS 19,128, at *21.

exist so as to justify entering a default judgment. Although Ninth Circuit case law is unclear on what constitutes "extraordinary circumstances,"¹²³ it is suggested that "extraordinary circumstances exist where there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision of a case."¹²⁴ In other words, a court should only enter a default judgment when the spoliation "eclipse[s] entirely the possibility of a just result."¹²⁵

(b) willfulness, bad faith, or fault

A court will next consider whether the destruction of documents can be attributed to the producing party's willfulness, bad faith, or fault. A party possesses such states of mind when it engages in "[d]isobedient conduct not shown to be outside [its] control."¹²⁶

(c) efficacy of lesser sanctions

Before imposing a default judgment, a court will consider the efficacy of less severe sanctions. Rejection of lesser sanctions is nevertheless appropriate in two circumstances: "(1) when no lesser sanction could both punish [d]efendants and deter others similarly tempted and (2) when the facts show that deceptive conduct has occurred and will continue."¹²⁷

123. *AdvantaCare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 U.S. Dist. LEXIS 16,835, at *15 (N.D. Cal. Aug. 17, 2004).

124. *Id.* (citing *Valley Eng'rs, Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057-58 (9th Cir. 1998)).

125. *Id.*

126. *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003) (quoting *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994)); see also *AdvantaCare*, 2004 U.S. Dist. LEXIS 16,835, at *16. In *AdvantaCare*, the producing party intentionally destroyed files in response to a cease and desist letter. *Id.* The party then purchased and used a deletion software to remove thousands of files from his computer. *Id.* The court found this conduct to be consistent with willfulness, bad faith, or fault. *Id.* For a more detailed description of negligence and bad faith, see discussion *supra* Part VII.C.4.a.ii.(a)-(b).

127. *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *17 (citing *Computer Assoc. Int'l v. Am. Fundware, Inc.*, 133 F.R.D. 166 (D. Col. 1990); see also *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); *Chism v. Nat'l Heritage Life Ins. Co.*, 637 F.2d 1328, 1332 (9th Cir. 1981)).

(d) relationship between misconduct and matters in controversy

“Destruction of evidence must go to the heart of the case.”¹²⁸ The Ninth Circuit has held that “spoliation of evidence raises a presumption that the destroyed evidence goes to the merits of the case, and further, that such evidence was adverse to the party that destroyed it.”¹²⁹

(e) prejudice to victim and relevant government interests

The Ninth Circuit uses prejudice to the victim as an optional consideration in deciding whether default judgment is appropriate.¹³⁰ In cases where the government is a party, the court may further account for the effects that dismissal would have on public policy concerns.¹³¹

b. Adverse inference instruction

A court also has the option of instructing the jury that it may draw an inference adverse to the spoliating party.¹³² An adverse

128. *Advantacare*, 2004 U.S. Dist. LEXIS 16835, at *19.

129. *Id.* (citing *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982); *see also* *Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987); *Computer Assoc. Int’l v. Am. Fundware, Inc.*, 133 F.R.D. 166 (D. Col. 1990)) (court found sufficient connection between the misconduct and matters in controversy where deleted computer files were relevant to plaintiffs’ claims of computer fraud, unfair competition, misappropriation, and breach of contract). For a more detailed description of relevancy, *see* discussion *supra* Part VII.C.4.b.

130. *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *20 (citing *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 382 (9th Cir. 1988)) (finding sufficient prejudice where deleted computer files were central to the merits of plaintiff’s claim). For a more detailed description of relevancy, *see* discussion *supra* Part VII.C.4.b.

131. *Halaco*, 843 F.2d at 382.

132. *See, e.g., AdvantaCare*, 2004 U.S. Dist. LEXIS 16,835, at *17. “The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is the common sense observation that a party who has notice that a document is relevant to litigation and who destroys the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The other rationale relates to sanctions’ punitive and preventative effects.” *Id.* at *21–*22 (citation omitted); *see also* *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 22, 2003); *Thompson v. United States Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003); *Liafail, Inc. v. Learning 2000, Inc.*,

inference instruction “is not to be given lightly,”¹³³ however. The *Zubulake* court summarized the effects of an adverse inference instruction as follows:

In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may “infer that the party who destroyed potentially relevant evidence did so ‘out of a realization that the [evidence was] unfavorable,’” the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.¹³⁴

In deciding whether to provide an adverse inference instruction, courts generally consider the spoliating party’s degree of culpability.¹³⁵

c. Civil contempt sanctions

Courts also have the authority to impose sanctions under their civil contempt power.¹³⁶ Such civil contempt sanctions are appropriate where a party has violated a court-issued preliminary injunction.¹³⁷ Civil contempt sanctions are wholly remedial and are employed both to “coerce [the spoliating party] into compliance with court orders or to compensate the complainant for losses

Nos. 01-599 GMS & 01-678 GMS, 2002 U.S. Dist. LEXIS 24803, at *9 (D. Del. Dec. 23, 2002); *Pennar Software Corp. v. Fortune 500 Sys., Ltd.*, No. 01-01734 EDL, 2001 U.S. Dist. LEXIS 18432, at *16 (N.D. Cal. Oct. 25, 2001).

133. *Thompson*, 219 F.R.D. at 100.

134. *Zubulake*, 220 F.R.D. at 219–20 (footnotes omitted).

135. *See Thompson*, 219 F.R.D. at 101; *see also Liafail*, 2002 U.S. Dist. LEXIS 24803, at *12 (stating that juries are permitted to infer that a party’s “bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party”).

136. *See, e.g., AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *23.

137. *See, e.g., Harris Ry. Elecs., LLC v. Westinghouse Air Brake Co.*, No. 99-070-GMS, 2004 U.S. Dist. LEXIS 16329, at *19–*20 (D. Del. Aug. 18, 2004); *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *23; *Pennar*, 2001 U.S. Dist. LEXIS 18432, at *12.

sustained.”¹³⁸

Courts typically impose the minimum sanction necessary to impose compliance.¹³⁹ When determining the severity and duration of the sanction, courts must consider the “character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.”¹⁴⁰ Furthermore, a court must always provide the spoliating party with an opportunity to bring itself into compliance with the injunction before imposing sanctions.¹⁴¹ Lastly, the sanction must come to an end once the party ceases to act in contempt of court.¹⁴²

d. Attorney's fees

Although the “American Rule” generally prohibits fee-shifting, a court may impose attorney’s fees when a party willfully disobeys a court order or acts in bad faith.¹⁴³

D. Spoliation's Future

1. Proposed Electronic Discovery Rules

“Although the federal discovery rules are well drafted to be flexible, it is becoming increasingly clear that they do not adequately accommodate the new forms of information technology.”¹⁴⁴ In response to the rules’ imperfections, organized bar groups, litigants, lawyers, and judges began urging the Civil Rules Committee to consider rule changes to “accommodate the distinctive features” of

138. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 378 (4th Cir. 2004); see also *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *23; *Pennar* 2001 U.S. Dist. LEXIS 18432, at *17–*18 (stating that “[c]ivil contempt is a coercive measure designed to force a party to comply with the Court’s order”).

139. *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *23–*24.

140. *Id.* at *24 (quoting *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992)).

141. *Id.*; see *Pennar*, 2001 U.S. Dist. LEXIS 18432, at *18 (noting that “[c]ontempt is inappropriate where a party has taken ‘all the reasonable steps it can take to comply’”).

142. See, e.g., *AdvantaCare*, 2004 U.S. Dist. LEXIS 16835, at *24.

143. See, e.g., *id.* at *27; *Pennar*, 2001 U.S. Dist. LEXIS 18432, at *11. For a detailed discussion of cost shifting during the course of electronic discovery, see *supra* Part IV.

144. ADVISORY, *supra* note 3, at 3.

electronic discovery.¹⁴⁵

The Committee responded by drafting proposed amendments to the Federal Rules of Civil Procedure, with the twin aims of “making the rules better able to accommodate the qualitative and quantitative differences between electronic discovery and conventional discovery and . . . [providing] a framework to resolve the issues electronic discovery presents.”¹⁴⁶ Although the Committee recognized that changes in technology would continue to occur in rapid and unpredictable ways, it reminded the legal community of the importance of having both a structured and flexible set of discovery rules.¹⁴⁷

a. Proposed amendment to rule 26(b)(2)

As it stands, parties are obliged to preserve all evidence to the extent required under Fed. R. Civ. P. 26.¹⁴⁸ The proposed amendment to Rule 26(b) reads as follows:

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.¹⁴⁹

i. Defining “reasonably accessible”

In terms of spoliation, the proposed amendment would alter the scope of the duty to preserve, limiting it only to “reasonably accessible” information.¹⁵⁰ Whether information was reasonably

145. *Id.* at 2.

146. *Id.* at 5.

147. *See id.* at 20.

148. *See, e.g.,* Wiginton v. CB Richard Ellis, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *12 (N.D. Ill. Oct. 24, 2003); Danis v. USN Communications, Inc., 53 Fed. R. Serv. (West) 828, 870 (N.D. Ill. 2000); Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 434 (W.D. Pa. 2004); Thompson v. United States Dep’t of Hous. & Urban Dev., 219 F.R.D. 93, 96 (D. Md. 2003). For a detailed discussion of the scope of electronic discovery, see *supra* Part III.

149. ADVISORY, *supra* note 3, at app. 6.

150. *See id.* app. at 34–35.

accessible would depend on a variety of circumstances. "One referent would be whether the party itself routinely accesses or uses the information. . . . [If so,] the information would ordinarily be considered reasonably accessible."¹⁵¹ Another consideration would be the time and cost involved in restoring the data.¹⁵² Information "deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques" would not ordinarily be considered reasonably accessible, despite the fact that "technology may provide the capability to retrieve and produce it through extraordinary efforts."¹⁵³

The proposed amendment to Rule 26(b)(2) appears to be more sympathetic toward companies' temporal and financial restraints, recognizing feasible production does not necessarily equate with practicable production. By essentially redefining reasonable behavior in a more realistic manner, the Advisory Committee has severely narrowed the scope of sanctionable behavior. As such, if the proposed amendment is accepted, one should expect the number of legitimate spoliation claims to decrease.

ii. Function of the "good cause" analysis

Despite the difficulty of retrieving data, a party may still have a duty to preserve evidence that its adversary has "good cause" to request.¹⁵⁴ "The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party."¹⁵⁵ The rule would be used to "discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems," whereas "[m]ore expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, [would] be

151. *Id.* app. at 12.

152. *Id.* app. at 11.

153. *Id.* Note that this standard starkly contrasts with current protocol for deleted data, which demands that a party exercise all available options to retrieve the deleted data, regardless of cost or difficulty. See discussion *supra* Part VII.B.4. The Committee simply felt that it would be "sensible" to limit discovery in this manner. ADVISORY, *supra* note 3, app. at 12.

154. ADVISORY, *supra* note 3, app. at 12.

155. *Id.* app. at 14.

conditioned upon a showing of need or sharing expenses.”¹⁵⁶

Like the reasonable accessibility requirement, the good cause analysis takes into account the technological realities of the modern business world. By preventing requesting parties from burying their adversaries with unnecessary production requests, the proposed amendment would presumably allow companies to maintain their day-to-day business obligations because they would not have to expend the manpower necessary to produce an overwhelming number of documents. Likewise, one would expect the number of valid spoliation claims to decrease, as the producing party would have to make a preliminary good cause showing before moving for sanctions.

b. Proposed amendment to rule 37

Parties found to have spoliated evidence can be subject to sanctions pursuant to Fed. R. Civ. P. 37.¹⁵⁷ The proposed amendment to Rule 37 comes in the form of a new subdivision—subdivision (f)—that details sanctions to be imposed for electronic discovery violations:

(F) ELECTRONICALLY STORED INFORMATION. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party’s electronic information system.¹⁵⁸

156. *Manual for Complex Litigation* (4th) § 11.446 (quoted in ADVISORY, *supra* note 3, app. at 14).

157. FED. R. CIV. P. 37.

158. ADVISORY, *supra* note 3, app. at 31–32.

i. Defining “reasonable steps”¹⁵⁹

“The reasonableness of the steps taken to preserve electronically stored information must be measured in at least three dimensions.”¹⁶⁰ The “outer-limit” of reasonableness is set by Fed. R. Civ. P. 26(b)(1).¹⁶¹

The new Rule 26(b)(2) provision sets a second limit, requiring that electronically stored information that is not reasonably accessible must be provided only on court order for good cause.¹⁶²

The third and final limit would depend upon “what the party knows about the nature of the litigation,” because such information would “inform [the party’s] judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information.”¹⁶³ Once those subjects and information systems are identified, e-mail records and electronic files of key individuals or departments “will be the most obvious candidates for

159. The proposed reasonable steps requirement is not significantly different than the existing duty to preserve. The most notable difference is that reasonable accessibility (as defined per the proposed amendments to Rule 26(b)(1)) would serve as a guidepost in determining whether the steps were reasonable pursuant to the proposed amendments to Rule 37. For a more detailed description of the reasonable accessibility requirement, see discussion *supra* Part VII.D.1.b.i.

160. ADVISORY, *supra* note 3, app. at 34.

161. *Id.* The rule reads as follows:

(B) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

FED. R. CIV. P. 26(b)(1).

162. ADVISORY, *supra* note 3, app. at 34. For a more detailed description of the proposed amendment to Rule 26(b)(2), see discussion *supra* Part VII.D.1.a.i–ii.

163. *Id.* app. at 35. Note that “other candidates for preservation will be more specific to the litigation and information system.” *Id.*

preservation.”¹⁶⁴

In assessing the steps taken by the party, the court would consider what the party knew or reasonably should have known when it took steps to preserve information.¹⁶⁵ “Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party’s electronic information system and the nature of the litigation.”¹⁶⁶

A court could also consider reasonableness in light of any existing “statutory or regulatory provision[s] for preserving information. Although violation of such a provision [would] not automatically preclude the protections of Rule 37(f),” statutory or regulatory provisions might serve as guideposts in determining whether the party “took reasonable steps to preserve the information for litigation.”¹⁶⁷

ii. Document retention policies

The proposed incorporation of document retention policies into the Federal Rules of Civil Procedure “is an open-ended attempt to describe the ways in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that specific information.”¹⁶⁸ The purpose of the subsection would be to encourage parties to design efficient electronic information storage infrastructures that serve the parties’ needs.¹⁶⁹ The safe harbor¹⁷⁰ would not be absolute, however, as “[d]ifferent considerations would apply if a system were *deliberately* designed to destroy litigation-related material.”¹⁷¹

Although the proposed amendment would provide a “narrow

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* app. at 34. It is worth noting that violation of such a statutory or regulatory provisions may subject the spoliator to sanctions in *another* proceeding, “but the court may not impose sanctions in the action if it concludes that the party’s steps satisfy Rule 37(f)(1).” *Id.* app. at 35–36.

169. *Id.* app. at 34.

170. As used in this part, “safe harbor” refers to action that is immune from discovery sanctions.

171. ADVISORY, *supra* note 3, app. at 34 (emphasis added).

‘safe harbor’” for a spoliating party,¹⁷² the Civil Rules Advisory Committee has yet to determine the degree of culpability that would preclude eligibility from this safe harbor.¹⁷³

iii. A note on preservation orders

Rule 37(f) would not apply if the party’s failure to provide the evidence resulted from its violation of a preservation order, since such an order should ordinarily be understood to include electronically stored information.¹⁷⁴ As such, a court might impose sanctions for violating a preservation order even if the party took reasonable steps to comply with the order.¹⁷⁵ If the party violated an order “in ways that are unrelated to the party’s current inability to provide the electronically stored information at issue,” however, the party would continue to benefit from Rule 37(f)’s protections.¹⁷⁶

Because of the breadth of the new safe harbor provision, one could speculate that courts would begin to grant preservation orders more frequently. In other words, a court could essentially circumvent safe harbor immunity by standardizing the issuance of preservation orders, which, as previously noted, are designed for extraordinary circumstances. If preservation orders became the rule rather than the exception, the “safety” of the discovery safe harbor would be rendered illusory, as would any supposed changes Rule 37 was intended to bring about.

172. *Id.* at 17.

173. *Id.* app. at 32 (star footnote). In its footnote, the Committee also provided an example of an alternate version of a new Rule 37(f) framed in terms of intentional or reckless failure to preserve for comment toward possible codification. It reads as follows:

(F) ELECTRONICALLY STORED INFORMATION. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party’s electronic system unless: (1) the party intentionally or recklessly failed to preserve the information; or (2) the party violated an order issued in the action requiring the preservation of information.

Id. app. at 32–33 (star footnote).

174. *Id.* app. at 36.

175. *Id.*

176. *Id.*

2. Conclusion

Although courts have made significant advances in developing a spoliation framework, they will never be equipped to fill all the remaining gaps in e-discovery law.¹⁷⁷ If accepted, the proposed amendments to the Federal Rules of Civil Procedure will no doubt serve as a useful tool to judges and litigators alike by allowing both parties to adhere to a more unified, yet flexible, framework.

In the meantime, both judges and litigators have been forced to self-educate in the sphere of e-discovery. Judges have become relatively technologically-savvy, which, in turn, has made them less tolerant of head-in-the-sand-type recalcitrant behavior by spoliating parties.¹⁷⁸ Litigators, on the other hand, have a myriad of e-discovery-based educational tools at their disposal, allowing them to keep abreast of both legal developments and professional services to facilitate the arduous task of undergoing this unique type of discovery.¹⁷⁹

177. Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 53, ¶ 29 (2004), available at <http://law.richmond.edu/jolt/v10i5/article53.pdf>. The author lists four reasons for judicial inefficiency in creating a cohesive e-discovery framework: (1) most reported discovery cases come from trial courts and, as a result, have little precedential value; (2) appellate courts rarely have the opportunity to provide guidance in this area because few discovery cases get appealed; (3) when such cases are appealed, the level of review is deferential, leaving most discovery determinations within the trial judge's discretion; and (4) "the reported decisions tend to involve obstructionist conduct at the most egregious end of the spectrum, [which provides] insufficient guidance to those acting in a mainstream manner." *Id.*

178. *Id.* ¶ 37.

179. LexisNexis' "Applied Discovery," for example, allows users to subscribe to e-discovery newsletters and even enroll in an "E-Discovery Best Practices Certification Course." Further information is available at <http://www.lexisnexis.com/applieddiscovery/>. Other companies, such as Kroll Ontrack, maintain a free database of current e-discovery case law, and can be hired as discovery experts. Further information is available at <http://www.krollontrack.com/>.